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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| GARY L. PETRY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 19A01-0606-PC-229 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE DUBOIS CIRCUIT COURT
The Honorable William E. Weikert, Judge
Cause No. 19C01-0204-FB-0051
19C01-0207-FA-0104

**FEBRUARY 22, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

## STATEMENT OF THE CASE

Defendant-Appellant Gary L. Petry appeals from the post-conviction court's denial of his petition for post-conviction relief.

We affirm and remand for correction of scrivener's error.

## ISSUES

Petry presents three issues for our review, which we restate as two:

I. Whether Petry's guilty plea was voluntary.

II. Whether Petry received effective assistance of counsel.

## FACTS AND PROCEDURAL HISTORY

Petry was charged with attempted murder, aggravated battery, and resisting law enforcement. Pursuant to a plea agreement, he pleaded guilty to the charge of attempted murder, and the charges of aggravated battery and resisting law enforcement were dismissed. In addition, the plea agreement called for a sentence of thirty (30) years with five years suspended and five years of probation, with probation terms to include restitution to the victim of Petry's crime. Petry later filed a petition for post-conviction relief. Following a hearing, the trial court denied Petry's petition. It is from this denial that Petry now appeals.

## DISCUSSION AND DECISION

The purpose of a petition for post-conviction relief is to provide a means for raising issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Capps v. State*, 709 N.E.2d 24, 25 (Ind. Ct. App. 1999), *trans. denied*. A post-conviction petition under Ind. Post-Conviction Rule 1 is a quasi-civil remedy, and, as

such, the petitioner bears the burden to prove by a preponderance of the evidence that he is entitled to relief. *Mato v. State*, 478 N.E.2d 57, 60 (Ind. 1985); P-C.R. 1, § 5. The judge who presides over a post-conviction hearing possesses exclusive authority to weigh the evidence and determine the credibility of the witnesses. *Stewart v. State*, 517 N.E.2d 1230, 1231 (Ind. 1988).

Upon review of a denial of post-conviction relief, this Court neither weighs the evidence nor determines the credibility of the witnesses. *Id*. To the extent the post-conviction court has denied relief, the petitioner appeals from a negative judgment and faces the rigorous burden of showing that "the evidence as a whole leads unerringly and unmistakably" to a conclusion opposite that reached by the post-conviction court. *Harris v. State*, 762 N.E.2d 163, 166 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied*. Thus, we will not set aside the post-conviction court's ruling unless the evidence is without conflict and leads solely to a result different from that reached by the post-conviction court. *Stewart*, 517 N.E.2d at 1231. In making this determination, we consider only the evidence that supports the decision of the post-conviction court together with any reasonable inferences. *McCullough v. State*, 672 N.E.2d 445, 447 (Ind. Ct. App. 1996), *trans. denied*. Moreover, although we do not defer to the post-conviction court's legal conclusions, we do accept its factual findings unless they are clearly erroneous. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *reh'g denied*, *cert. denied*, 540 U.S. 830, 124 S.Ct. 69, 157 L.Ed.2d 56 (2003). In summary, "the defendant must convince this Court that there is *no* way within the law that the court below could have reached the decision it did." *Id*. at 745.

## I. VOLUNTARINESS OF PLEA

### A. Illusory Promises

Petry first contends that the trial court erred in denying his petition for post-conviction relief because his guilty plea was not voluntary. Specifically, Petry argues that his plea was involuntary because it was based upon illusory promises regarding a federal firearms charge and the dismissal of the aggravated battery charge. In addition, Petry avers that his plea was not voluntary because his plea agreement contained an ambiguous restitution clause and because he did not understand the nature of the offense to which he pleaded guilty.

Before accepting a guilty plea, a trial court must first make certain inquiries in order to ascertain whether a defendant's plea is voluntary. *See* Ind. Code §§ 35-35-1-2; 35-35-1-3. Generally, if a trial court performs these steps, a post-conviction petitioner will have a difficult time overturning his guilty plea on collateral attack. *Lineberry v. State*, 747 N.E.2d 1151, 1156 (Ind. Ct. App. 2001). However, "'defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief.'" *Cornelious v. State*, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), *trans. denied* (quoting *State v. Moore*, 678 N.E.2d 1258, 1266 (Ind. 1997), *reh'g denied*, *cert. denied*). To assess the voluntariness of a plea, we review all of the evidence before the post-conviction court, including testimony from the post-conviction hearing, the transcript of the petitioner's original sentencing, and plea agreements or other exhibits that are part of the record. *Id*. at 357-58. If the State made a promise to the defendant and that promise comprised part of the inducement for the plea

agreement, that promise must be fulfilled; otherwise, the defendant's guilty plea is rendered involuntary. *Lineberry*, 747 N.E.2d at 1156.

1.) Filing of Federal Firearms Charge

There is no dispute between Petry and the State that there was an agreement regarding a federal firearms charge. Indeed, the promise is contained in the written plea agreement, as follows:

> (2) The parties agree that this plea agreement is contingent on the understanding that no federal firearms charge shall be filed against the defendant as it pertains to firearms the defendant may have possessed prior to and including April 9, 2002.

Appellant's Appendix at 88. Petry claims that the State's promise was unfulfillable because the prosecuting attorney had no assurances from the federal government that a firearms charge would not be filed, and, had a federal firearms charge been filed, the prosecuting attorney had no authority to promise its dismissal. The State argues, and the post-conviction court found, that this promise in the plea agreement merely created a contingency: the plea agreement was contingent upon there being no federal firearms charge filed against Petry for the particular time period. Simply stated, if the federal government brought a firearms charge against Petry for the designated time period, he would have the right to cancel the plea agreement in this case.

In spite of the potentially confusing wording of paragraph (2) of the plea agreement, our review of the plea agreement, plea hearing transcript, and sentencing hearing transcript leads us to reject Petry's assertion that paragraph (2) contained an unfulfillable promise by the State. A plea agreement is contractual in nature and is

binding on all the parties: the defendant, the State and the trial court. *Kopkey v. State*, 743 N.E.2d 331, 340 (Ind. Ct. App. 2001), *trans. denied*. When interpreting a plea agreement, courts should strive to give effect to the intentions of the parties just as they do with other contracts. *Id*. The trial court found that Petry's plea was entered into voluntarily, and the trial judge covered the matters required by Ind. Code § 35-35-1-2, which typically means that a plea is voluntary. *See Lineberry*, 747 N.E.2d at 1156. At the plea hearing, the trial court judge read paragraph (2) to Petry. The judge inquired whether Petry understood that portion of the plea agreement, and Petry responded in the affirmative. We would expect a prosecuting attorney to know that he or she cannot control charges that are filed by the federal government and would not, therefore, premise a term of a plea agreement upon such a promise. The prosecuting attorney can, however, change the course of state proceedings should federal charges be filed. We find no evidence in the record to support Petry's argument. Thus, Petry failed to show that he was misled into pleading guilty by the prosecutor based upon this term of his plea agreement.

2.) Dismissal of Aggravated Battery Charge

Next, Petry asserts that his plea was rendered involuntary by what he terms an illusory promise by the State to dismiss the charge of aggravated battery. Particularly, Petry maintains that because the charge of aggravated battery was a lesser-included offense of the charge of attempted murder to which he pleaded guilty, the State could not convict him of both charges and, therefore, the State's agreement to dismiss the charge of battery was illusory.

Petry was charged with attempted murder, aggravated battery, and resisting law enforcement. Although we are not provided in the materials on appeal with the charging information for the offense of attempted murder, we will assume, for the sake of this argument, that both offenses were predicated on Petry's act of discharging a handgun at the victim, striking the victim in the chest. Therefore, assuming Petry had gone to trial and been found guilty of both aggravated battery and attempted murder, he could have been convicted and sentenced for attempted murder only because these offenses are the same offense for double jeopardy purposes. *See Richardson v. State*, 717 N.E.2d 32, 49-50 (Ind. 1999) (setting forth tests for double jeopardy analysis for same offenses).

A bargained plea, motivated by an improper threat, is deemed to be illusory and a denial of substantive rights. *Daniels v. State*, 531 N.E.2d 1173, 1174 (Ind. 1988). However, an illusory threat is not a *per se* basis for relief; rather, it must be a motivating factor for the plea. *Marshall v. State*, 590 N.E.2d 627, 630 (Ind. Ct. App. 1992), *trans. denied*. The issue then is whether Petry met his burden of proving that his plea was induced by an improper threat.

Where the charging information complies with the statutory requirements, the State is not required to dismiss allegedly repetitive charges. *Id*. at 631. Although a defendant charged and found guilty may not be convicted and sentenced more than once for the same offense, the State has unrestricted discretion to file allegedly repetitive charges. *Id*. This unrestricted discretion prevents any of the multiple counts from being considered as illusory merely because they are filed. Certainly, the situation would be different if Petry actually had been told that he could be convicted and sentenced on each

of the counts in question. However, the record does not reveal that Petry was so advised, and we are not directed to any evidence of such an advisement. Furthermore, Petry provides no argument and makes no showing that the State's promise of dismissal of the aggravated battery charge induced him to plead guilty in this case. Petry's claim fails.

B. Restitution Clause

Petry also avers that his plea was not voluntary because it contained an ambiguous restitution clause. In particular, he states that his plea agreement contained a restitution clause that did not inform him that restitution was a condition of his probation and did not inform him as to the extent of the restitution.

1.) Restitution as Condition of Probation

Petry alleges that his plea agreement contains "an ambiguous clause for restitution that does not inform [him] the restitution would be a part of probation." Appellant's Brief at 10. This is simply not the case. Petry's plea agreement is clear in requiring restitution as part of his probationary period. Paragraph (1)(b) specifically states, in pertinent part: "Following incarceration, the defendant shall be placed on five (5) years of probation with conditions of probation to be determined by the Court, *to include restitution*." Appellant's Appendix at 87 (emphasis added). Additionally, at the plea hearing, the court read paragraph (1)(b) and asked Petry if that was his understanding of that part of the plea agreement. Petry answered in the affirmative and responded that he had read the whole plea agreement. At sentencing, the judge reiterated that Petry would be on probation for five years with probation conditions, including restitution, to be

determined by the court. Thus, we find no basis for Petry's argument that he was not informed that restitution would be a part of his probation.

2.) Amount of Restitution

Next, Petry claims that the amount of restitution should have been included in the plea agreement so that he would be fully informed of the consequences of his guilty plea. Because the specific amount of restitution was not included in Petry's plea agreement, he argues that his plea was not voluntary.

Again, we start with the trial court's inquiries found in Ind. Code § 35-35-1-2. The trial court in the present case made the proper inquiries and found Petry's plea to be voluntary. Generally, this means the plea was voluntary and the post-conviction petitioner will have a difficult time overturning his plea. *See Lineberry*, 747 N.E.2d at 1156. However, if a defendant can show that he was coerced or misled into pleading guilty by the judge, prosecutor or defense counsel, it will give rise to a claim for relief. *Cornelious*, 846 N.E.2d at 357.

At the plea hearing in the present case, the court read to Petry paragraph (1)(b) of the plea agreement, which states that the conditions of his probation will include restitution. Petry then acknowledged to the court that he understood that particular term of his plea agreement. During sentencing, the court, the State and defense counsel engaged in a discussion regarding the issue of restitution. Prior to the court sentencing Petry, the State advised that the restitution amount would be in the range of $90,000 to $150,000. At that time, the State did not yet have all of the victim's medical bills and requested further time to obtain those bills. Petry interposed no objection to the

estimated amount of restitution, to continuing with his sentencing at that time, or to allowing the State further time to obtain the victim's medical bills. The court sentenced Petry and set a further hearing for determining the exact amount of restitution. At the subsequent restitution hearing, the State provided the medical bills to defense counsel, who requested time to review the medical expenses. Petry then advised the court that he did not wish to be present at any further hearing concerning the victim's medical expenses. The court held another hearing, at which Petry was not present per his request, and ordered restitution in the amount of $105, 576.41.

If the State and a defendant include a term in the plea agreement providing the trial court with the discretion to establish the terms of probation, both parties take their chances, and the court is within the express terms of the plea agreement in imposing some, all or none of the lawful conditions. *Freije v. State*, 709 N.E.2d 323, 325 (Ind. 1999). Here, pursuant to paragraph (1)(b) of the plea agreement, the conditions of probation were to be determined by the court, and restitution was made a condition of probation. Thus, Petry expressly agreed to allow the trial court to establish the terms of his probation, including restitution. *Cf. Antcliff v. State*, 688 N.E.2d 166 (Ind. Ct. App. 1997) (determining that although home detention was not mentioned in the plea agreement trial court's order of home detention as a condition of probation was proper because plea agreement specifically provided that trial court had discretion to establish conditions of probation).

Petry is correct that the amount of restitution was not included in the written plea agreement; however, the fact that Petry would be paying restitution to the victim of his

crime was specifically included in his plea agreement as a condition of his probation, as noted above. Moreover, at the plea hearing, the State provided to Petry and the trial court an estimation of the restitution amount, and Petry failed to object. In fact, after being advised of the potential amount of restitution, Petry proceeded to be sentenced. Further, Petry points to no evidence to prove that his plea was not voluntary. Thus, considering that Petry expressly agreed to allow the trial court to establish the terms of his probation, failed to object to the amount of restitution, and expressly requested to be absent at the final hearing determining the specific amount of restitution, we cannot conclude that the trial court erred in concluding that his plea was voluntary.

C. Nature of Offense

The final issue with regard to the voluntariness of Petry's plea is his contention that he did not understand that the offense of attempted murder requires the specific intent to kill, and, therefore, he did not understand the nature of the offense to which he pleaded guilty.

Our supreme court's decision in *Patton v. State*, 810 N.E.2d 690 (Ind. 2004) is instructive on this issue. In that case, the defendant pleaded guilty to attempted murder and later filed a petition for post-conviction relief, which was denied. He appealed to this Court claiming, among other things, that his guilty plea to the offense of attempted murder was not knowing, voluntary and intelligent. This Court found that Patton's guilty plea to attempted murder was not knowing, voluntary and intelligent, and the State petitioned to transfer to our state supreme court. The supreme court vacated Patton's conviction and sentence for attempted murder based upon its conclusion that Patton did

not receive real notice of the true nature of the charge against him. In coming to this conclusion, the court set out several determining factors, which we will apply to Petry's case.

The *Patton* court set forth several principles to guide our resolution of cases involving notice of the elements of an offense, in general, to which a defendant pleads guilty, and notice of the intent to kill when a defendant pleads guilty to attempted murder, specifically. A defendant has a constitutional right to "'real notice of the true nature of the charge'" to which he or she pleads guilty. *Patton*, 810 N.E.2d at 696 (*quoting Henderson v. Morgan*, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)); *see also* Ind. Code § 35-35-1-2(a)(1) and (c). This right will be fulfilled where the transcript of the guilty plea contains either an explanation of the charge by the judge, or at least a representation by defense counsel that the nature of the offense has been explained to the defendant. *Id*. (*citing Henderson*, 426 U.S. at 647).[1] Yet, in the absence of either of these two situations, it may be appropriate to presume that in most cases defense counsel routinely explains the nature of the offense in sufficient detail to give the defendant notice of what he or she is admitting. *Id*. Where, however, intent is a critical element of the offense, as it is for the offense of attempted murder, notice of that element is required. *Id*. (*citing Henderson*, 426 U.S. at 647 n.18). Even where the required notice has not been given and cannot be presumed, a defendant is not entitled to relief if the error is

[1] Although not the only way to satisfy the requirement of notice, advisement by the court of the separate elements of an offense is encouraged by our state's highest court. *See Patton*, 810 N.E.2d at 694 (*citing DeVillez v. State*, 275 Ind. 263, 267, 416 N.E.2d 846, 849 (1981)).

harmless beyond a reasonable doubt. *Patton*, 810 N.E.2d at 696. Failure of notice that specific intent is an element of attempted murder will constitute harmless error where, during the course of the guilty plea or sentencing proceedings, the defendant unambiguously admits to, or there is other evidence of, facts that demonstrate specific intent beyond a reasonable doubt. *Id*. at 696-97.

In the present case, Petry pleaded guilty to the offense of attempted murder. Because intent is a critical element of the offense of attempted murder, Petry is required to have notice of this element. *See Patton*, 810 N.E.2d at 696. The post-conviction court denied Petry's claim for relief finding that Petry admitted to shooting the victim in the chest with the intent to kill him. *See* Appellant's App. at 24. In the appellate review of a post-conviction court's judgment denying post-conviction relief, our role is to determine whether the undisputed evidence unerringly and unmistakably leads us to an opposite conclusion. *Harris*, 762 N.E.2d at 166.

First, we note we have no evidence of any advisement or explanation given to Petry by his counsel because counsel did not testify at the post-conviction hearing. He did, however, provide an affidavit which states that, although he discussed the state's evidence with Petry and explored possible defenses, he no longer has any independent recollection of the trial proceedings in Petry's case. Where a defendant has not been given notice of the specific intent element of attempted murder and notice cannot be presumed, the defendant will nevertheless not be entitled to relief where, during the course of the guilty plea or sentencing proceedings, he unambiguously admits to, or there is other evidence of, facts that demonstrate specific intent beyond a reasonable doubt.

*Patton*, 810 N.E.2d at 696-97. Our review of the evidence at the guilty plea and sentencing hearings demonstrates Petry's awareness of the specific intent to kill.

At Petry's plea hearing, the judge read the charging information to Petry as follows:

> COURT: Okay. This plea agreement calls for you to plead guilty in cause number 0207-FA-0104, attempted murder. I would advise you that the state would have to prove beyond a reasonable doubt that on or about April 9, 2002, in Dubois County, that you did attempt to commit the crime of murder, in that you *intentionally* fired a handgun at Jeremy W. Hart, striking Jeremy W. Hart in the chest; which act constituted a substantial act towards the crime of murder. Do you understand that's what the state would have to prove beyond a reasonable doubt?
>
> PETRY: Yes.

Tr. of Plea Hearing at 5-6 (emphasis added). To establish a factual basis for Petry's plea, the State questioned Petry in this manner:

> STATE: Okay. Would you agree if this case were taken to trial, that the State would present evidence that would show beyond a reasonable doubt that on or about April 9, 2002, here in Dubois County, State of Indiana, at 351 West 600 North in Jasper, that you did attempt to commit the crime of murder by intentionally firing a nine millimeter handgun at Jeremy W. Hart, striking Mr. Hart in the chest, which conduct constituted a substantial step towards the crime of murder, to-wit: to intentionally kill another human being?
>
> PETRY: Would I do what with that?
>
> STATE: Would you agree that the evidence would show beyond a reasonable doubt at trial what I just stated?
>
> PETRY: Would I agree that your evidence would show that I was guilty? I don't know whether it would or not. Would it?
>
> STATE: Are you, in fact, guilty of this charge, Mr. Petry?
>
> PETRY: I said I was.

STATE: Okay. So you're admitting that you did shoot Jeremy Hart in the chest with the intent to kill him?

PETRY: I'm admitting to shooting Jeremy Hart in the chest, yes, sir.

STATE: Did you shoot him in the chest with the intent to kill him?

DEFENSE COUNSEL: He's asking whether you agree that the evidence…

PETRY: I know what he's asking me.

DEFENSE COUNSEL: Well, if the evidence would show beyond a reasonable doubt that….

PETRY: Yeah. Yes.

COURT: Do you agree? Is that correct, Mr. Petry?

PETRY: Yes.

Tr. of Plea Hearing at 8-10.

Following the same guidelines, our supreme court analyzed Patton's plea to attempted murder. Neither the court nor Patton's counsel specifically advised Patton of the element of specific intent. In addition, although the State read the charging information to Patton, the information alleged only that Patton "knowingly" tried to kill the victim. Further, Patton never acknowledged shooting at his victim or even knowing that his victim was in the vehicle when he fired the shot. Therefore, the court held that at the time Patton pleaded guilty to the offense of attempted murder, he did not know that specific intent to kill was an element of the offense.

Here, unlike in *Patton*, the court used the term "intentionally" when the judge read the charging information to Petry at his plea hearing. Further, at his plea hearing, Petry

acknowledged shooting his victim in the chest with the intent to kill him. Thus, on the basis of these facts, Petry's understanding of the element of intent to kill is supported by his acknowledgement of guilt at his guilty plea hearing. The undisputed evidence does not lead us to a conclusion opposite that reached by the post-conviction court.

## II. ASSISTANCE OF COUNSEL

For his second broad category of error, Petry asserts that he received ineffective assistance of counsel. Particularly, he maintains that his trial counsel was ineffective in that counsel negotiated illusory terms in Petry's plea agreement, failed to conduct an investigation into the existence of a mental illness and the possibility of a plea of guilty but mentally ill, and failed to object to the procedures used to determine restitution.

In general, claims of ineffective assistance of counsel are reviewed under a two-part test: (1) a demonstration that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) a showing that the deficient performance resulted in prejudice. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (*citing Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Prejudice occurs when the defendant demonstrates that there is a reasonable probability that, if not for counsel's unprofessional errors, the result of the proceeding would have been different. *Grinstead*, 845 N.E.2d at 1031. A reasonable probability occurs when there is a probability sufficient to undermine confidence in the outcome. *Id*.

In order for a post-conviction petitioner who pleaded guilty to prevail on a claim of ineffective assistance of counsel, he or she must establish both that counsel's

performance was deficient and a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Oliver v. State*, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), *trans. denied*, 855 N.E.2d 1008. Appellate review of the post-conviction court's decision is narrow, and we give great deference to the decision of the post-conviction court. *Grinstead*, 845 N.E.2d at 1031. We will reverse the decision of the post-conviction court only when the evidence, as a whole, leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id*.

A. Negotiating Illusory Plea Agreement Terms

Petry's first complaint of error concerns his counsel's performance in negotiating terms of Petry's plea agreement. Specifically, Petry avers that his counsel rendered deficient performance in negotiating the dismissal of the battery charge and the agreement regarding a federal firearms charge because, he alleges, these terms are illusory.

Having previously determined that neither of these plea agreement terms is illusory, we cannot now conclude that Petry's counsel was deficient in negotiating them. Further, in support of this argument, Petry provides nothing more than his self-serving statements that counsel advised him he could be convicted and sentenced on both the charges of aggravated battery and attempted murder and failed to advise him that the state had no authority to determine the filing or dismissal of a federal firearms charge. Moreover, Petry failed to assert, much less establish, a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to

trial.[2] Nevertheless, Petry has failed to establish that counsel's performance was deficient, and we may end our inquiry here. *See Grinstead*, 845 N.E.2d at 1031 (although two parts of test for ineffective assistance of counsel are separate inquiries, claim may be disposed of on either prong). The post-conviction court properly denied Petry's claim on this issue.

B. Reasonable Investigation

Petry next contends that his trial counsel failed to conduct a reasonable investigation into the facts and law of the case. Petry makes sweeping allegations that his trial counsel failed to develop a coherent theory of the case and points to no evidence to support his claim. Generally, establishing ineffective assistance of counsel for failure to investigate requires going beyond the trial record to show what the investigation, if undertaken, would have produced. *Woods v. State*, 701 N.E.2d 1208, 1214 (Ind. 1998), *reh'g denied, cert. denied*. This showing is necessary because success on the prejudice prong of an ineffectiveness claim requires a showing of a reasonable probability of affecting the result. *Id.* Petry's attempt to establish his counsel's deficiency in this regard is unsuccessful.

C. Investigation of Mental Illness

[2] Petry asserts in his brief that he "gained no benefit from the plea agreement" and that "there is a reasonable probability he would have had a more favorable outcome at trial." Appellant's Brief at 17-18. We note that not only is this bald claim insufficient to satisfy the standard for showing defective assistance by counsel, but also it completely ignores the fact that Petry's plea agreement limited his possible sentence to thirty years with five years suspended, provided for the dismissal of the resisting law enforcement charge, and provided that the State would not object should Petry petition for reinstatement of his driver's license following his incarceration.

Intertwined with the preceding issue, Petry also asserts as error his counsel's failure to adequately investigate his mental illness and pursue a plea of guilty but mentally ill. Specifically, Petry avers that his counsel suspected that he had a mental illness but failed to pursue a guilty but mentally ill plea agreement.

1.) Investigation of Existence of Mental Illness

In his brief, Petry cites *Prowell v. State*, 741 N.E.2d 704 (Ind. 2001). There our supreme court reversed the denial of post-conviction relief and found that Prowell had received ineffective assistance of trial counsel. In that case, both trial counsel testified at the post-conviction hearing that, from the outset of their representation of Prowell, they believed Prowell to be mentally ill. Although they believed Prowell to be mentally ill, they did not consider recommending a plea of guilty but mentally ill, and they did not have Prowell evaluated until after he had pleaded guilty without a plea agreement. That evaluation produced a diagnosis of paranoid personality disorder, a relatively minor mental disorder in comparison to more severe forms of paranoia. Prowell received the death sentence. Subsequently, two psychiatrists evaluated Prowell in preparation for his post-conviction hearing. At the post-conviction hearing, they testified to a diagnosis of chronic schizophrenia at the time he committed the murders, a more severe disease than the previous diagnosis of paranoid personality disorder, and stated that it was highly likely that Prowell acted under paranoid delusions at the time of the shootings. The previous misdiagnosis was due, in part, to the failure of Prowell's attorneys to provide all the information necessary for a correct diagnosis.

In the second case cited by Petry, trial counsel did not consult with a mental health professional at all. In *McCarty v. State*, 802 N.E.2d 959 (Ind. Ct. App. 2004), *trans. denied*, trial counsel met with McCarty only once before the guilty plea hearing. McCarty's trial counsel testified at the post-conviction hearing that based on his interaction with McCarty, McCarty did not appear mentally disabled. Counsel, therefore, did not pursue an investigation of McCarty's mental status and did not secure the services of a mental health professional. McCarty presented testimony at his post-conviction hearing that he had been in special education classes and that, when he was twenty years old, tests revealed he was functioning at a ten-to-thirteen-year-old level. Based upon these facts, this Court reversed the trial court's denial of McCarty's petition for post-conviction relief.

The instant case is distinguishable from the cases cited by Petry in his brief. The CCS reveals that on the same date counsel entered his appearance on behalf of Petry, he also filed a motion for psychiatric examination to determine Petry's competency to stand trial and notice of defense of mental disease or defect. Petry was evaluated by two doctors, who made similar conclusions. Dr. Liffick concluded that Petry suffered from alcohol dependence and a major depressive disorder. He found that Petry understood the charges against him and the possible consequences and that Petry's depression did not impair his ability to cooperate with his attorney. Dr. Liffick also stated that Petry's illness of depression did not prevent him from understanding the wrongfulness of the acts he committed and that he found no significant evidence of psychiatric illness. Likewise, Dr. Hilton concluded that Petry understood the charges he was facing and possessed the

requisite ability to assist his attorney in his defense. He diagnosed Petry with chronic pain disorder and recurrent major depression at the time of the shooting. Dr. Hilton found that both of these diagnoses could be considered mental diseases or defects, but cautioned that neither illness would have rendered Petry unable to appreciate the wrongfulness of his actions at that time. The two psychiatrists testified at Petry's competency hearing, after which the trial court found Petry to be competent to stand trial.

In its Findings of Fact, the post-conviction court stated that Petry's trial counsel attempted to develop mental health testimony before advising Petry to plead guilty and that Petry was examined by two psychiatrists who testified that Petry understood the wrongfulness of his acts. Further evidence is sparse on this issue. Petry's counsel's affidavit states his belief that he provided Petry with competent representation and that he explored all of the potential defenses available to Petry. Petry neither called his trial counsel as a witness nor presented any other evidence on this issue at the post-conviction hearing. From these materials, we discern that Petry's counsel did investigate Petry's mental illness. He immediately requested the evaluation of Petry and requested a competency hearing. Petry has not fulfilled his burden to show that counsel's performance was deficient in investigating his mental illness.

2.) Investigation of Plea of Guilty But Mentally Ill

A plea agreement for a plea of guilty but mentally ill may have been investigated by Petry's counsel. We have no evidence on this issue other than counsel's affidavit stating that he believes he was competent in his representation of Petry. Petry neither presents evidence that his counsel failed to explore such a plea agreement nor submits

evidence that counsel explored the idea but failed in some respect to obtain an agreement. Indeed, Petry presents absolutely no evidence to support this assertion of error. The absence of such a plea in this case does not automatically, or even necessarily, imply that counsel failed to perform in a reasonable manner based upon prevailing professional norms.

Furthermore, Petry has failed to make any showing that, had his counsel obtained a guilty but mentally ill plea agreement, his sentence would have been different. Ind. Code § 35-36-2-5 states that a court accepting a defendant's plea of guilty but mentally ill shall sentence the defendant in the same manner as a defendant found guilty of the offense. Evidence of the defendant's mental illness is then considered at sentencing. Our supreme court has directed our state's trial courts to, at a minimum, carefully consider on the record what mitigating weight, if any, to accord to any evidence of mental illness. *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998). However, there is no obligation to give the evidence the same weight the defendant does. *Id*. A guilty but mentally ill defendant is not automatically entitled to any particular credit or deduction from his otherwise aggravated sentence simply by virtue of being mentally ill. *Id*.

Not only does Petry make no showing that his sentence would have been different had counsel obtained a guilty but mentally ill plea, but also Petry wholly ignores the fact that his plea agreement called for the *presumptive* sentence of thirty years, with five years suspended. Although Petry's sentence was set by his plea agreement and not left to the discretion of the court, it is important to note that evidence of mental illness is reviewed by the sentencing court in order to perhaps reduce an *aggravated* sentence. Petry did not

receive an aggravated sentence; rather, he received the presumptive sentence with five years suspended. Petry has failed to show that his counsel's performance was deficient.

D. Failure to Object

For his final allegation of error, Petry maintains that his trial counsel performed deficiently by failing to object to the procedures used for ordering restitution. Specifically, Petry argues that his counsel erroneously failed to object to the court's failure to inquire into Petry's ability to pay the restitution amount, to the court's order of payments prior to the start of Petry's probationary term, and to the court's failure to order the manner of payment.

1.) Failure to Object to Court's Failure to Determine Petry's Ability to Pay

We first address Petry's claim that his counsel was deficient for failing to object to the court's failure to inquire into his ability to pay the restitution amount. Ind. Code § 35-38-2-2.3(a)(5) provides that when restitution is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay. At Petry's sentencing, the following exchange took place between Petry's counsel, the court, and Petry regarding his ability to pay. This exchange immediately follows the State's statement that restitution would range from $90,000 to $150,000:

> COURT: [Petry's counsel], any objection to that?
>
> COUNSEL: I…I don't really have an objection, your Honor. I think I'd also like to be able to explore if there are any other avenues of revenue, such as victim's funds, and I think one thing we need to make sure is that, as I understand, the victim had other medical problems prior to this. And we need to be able to sort out those bills.

> COURT: Okay. I understand. Normally, when somebody goes to prison, there isn't any income from that defendant that's available. But it's my understanding that Mr. Petry may have some disability payments that he will receive while in prison. Is that correct?
>
> COUNSEL: Mr. Petry right now is receiving social security disability and a union disability. I have not…
>
> PETRY: Pension.
>
> COUNSEL: Pardon me?
>
> PETRY: Pension.
>
> COUNSEL: Well, pension. And I have not…uh…I do not have the union document to know if that will continue. It's my understanding that social security disability will stop upon incarceration.
>
> COURT: Okay. So does Mr. … I think it's a good plan to look at this in about ninety days to see what the victim's claim is, and also to see if there is any availability of funds on the part of the defendant. Does Mr. Petry have any objection to leaving that part open for ninety days?
>
> COUNSEL: No.

Tr. of Sentencing Hearing at 14-15. However, this is the only evidence we have on this subject. Petry failed to include the transcript of the remaining restitution hearings in his materials on appeal. Thus, we do not know whether the trial court further inquired into Petry's ability to pay and, if not, whether counsel objected to the court's failure to do so. Petry falls far short of fulfilling his burden of establishing both that counsel's performance was deficient and a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *See Oliver*, 843 N.E.2d at 591.

2.) Failure to Object to Court's Order to Commence Restitution Payments

Next, Petry contends that his counsel was ineffective for not objecting when the court improperly ordered him to begin making restitution payments prior to the start of his probationary term. However, Petry cites no cases in support of this argument. In fact, his entire argument on this subject consists of one sentence.

This Court has held that "[t]he probationary period begins immediately after sentencing and ends at the conclusion of the probationary phase of the defendant's sentence." *Rosa v. State*, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005). Therefore, the trial court did not err in ordering restitution payments, which are a condition of Petry's probation, to begin upon sentencing because his probation also began upon sentencing. Because there was no error to which Petry's counsel should have objected, Petry's counsel was not defective for failing to object.

3.) Failure to Object to Court's Failure to Order Manner of Payment

Petry avers that his counsel rendered sub-standard assistance by failing to object to the trial court's failure to order the manner of payment of restitution. Ind. Code § 35-38-2-2.3(a)(5) provides that when restitution is a condition of probation, the court shall fix the manner of performance.

In the present case, the court held a hearing on June 30, 2003, from which Petry requested to be absent, to determine the amount of restitution. At that hearing, the court determined the amount of restitution and set the manner of performance. The certified copy of the CCS shows that the court found that Petry owes restitution in the amount of $105, 576.41. The court further ordered Petry to pay $300 per month through the office of the Dubois Circuit Court until the amount of restitution is paid in full. The court also

listed the victim's medical providers in the order that they are to be paid. Appellant's App. at 17-18. Therefore, contrary to Petry's argument, the court did order the manner of performance for the payment of restitution, and counsel did not err by failing to object.

We note that although the CCS shows the court's order of manner of payment, the court's written "Restitution Judgment Order" inexplicably omits that term, noting only the restitution amount and the victim's medical providers in the order they are to be paid. Appellant's App. at 92-93. We assume, without evidence of anything more, that this is merely a scrivener's error. This error does not warrant the reversal of the post-conviction court's denial of Petry's post-conviction petition. The trial court was aware of the statutory requirement in ordering manner of payment and clearly fulfilled that requirement. We do, however, think it prudent for the trial court to correct its "Restitution Judgment Order," file-stamped June 30, 2003, to reflect the court's order of manner of payment of restitution. Therefore, we remand only for that correction.

## CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that Petry's plea of guilty was voluntary and that he received effective assistance of counsel. We remand for correction of a scrivener's error regarding the manner of payment of restitution in the trial court's June 30, 2003 order entitled "Restitution Judgment Order."

Affirmed and remanded for correction of scrivener's error.

SHARPNACK, J., and MATHIAS, J., concur.